No. 06-287

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, Jr., Acting Warden, San Quentin State Prison, California, Petitioner,

v.

WILLIAM CLARK, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI; RESPONDENT'S APPENDIX

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Statement of the Case

The background of the case at bar is adequately described in the Ninth Circuit opinion, and for the sake of brevity Respondent William Clark ("Clark") refers the Court to that opinion. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 5-8. Clark briefly adds the following:

Clark asserted in his federal habeas corpus petition and argued in the courts below that the arson special circumstance – the sole special circumstance making him death-eligible – violated due process for two distinct reasons: First,

> that the trial court's failure to give his requested jury instruction under *Green*[1] violated due process under *California v. Trombetta*, 467 U.S. 479, 485 (1984), by unfairly depriving him of a "meaningful opportunity to present a complete defense." Second, he argue[d] that the California Supreme Court's expansion of *Green* and reinterpretation of the felony-murder special circumstance statute was an unforeseeable new interpretation of California law, and that the retroactive application of this new interpretation on appeal violated due process under *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

Pet. App. at 8.[2]

The Ninth Circuit "agree[d] with both of Clark's contentions" and granted relief on the basis of each of these grounds. Pet. App. at 8, 25, 26. The court stated: "We hold that there were two interrelated due process violations in this case: first, the trial court's refusal to give the *Green*-based instruction, and second, the California Supreme Court's retroactive application of its unforeseeable new interpretation of *Green*. We further hold that these violations were not harmless." Pet. App. at 26.

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[1] *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

[2] Clark presented his jury instruction claim to the California Supreme Court in his direct appeal. *Id.* at 68-72, 108-10. Clark presented his ex post facto claim to the California Supreme Court in his first state habeas petition, which the court denied without an opinion or citation to authority. *In re Clark*, 5 Cal. 4th 750, 760-61, 855 P.2d 729, 21 Cal. Rptr. 509 (1993).

The Ninth Circuit aptly summarized its ex post facto holding at pages 17-18 of Petitioner's Appendix:

> [U]nder *Green*, a felony qualified under the special circumstance statute only if two requirements were satisfied: (1) the felony, such as robbery or arson, must have been committed for a purpose "independent" of the murder, and (2) the murder must have been committed in order to advance that "independent felonious purpose." 27 Cal.3d at 61, 164 Cal.Rptr. 1, 609 P.2d 468. The example given by the Court in *Green* of a felony murder qualifying as a special circumstance was the murder of a witness to, or victim of, a holdup, kidnaping or rape. *Id.* In the Court's example, the holdup, kidnaping or rape was the "independent" felony (requirement one). The murder of the witness or victim was committed in order to advance the independent felonious purpose of the holdup, kidnaping or rape (requirement two).
>
> On appeal in *Clark*, the California Supreme Court significantly changed the first requirement and entirely dispensed with the second. The Court changed the first requirement by expanding the definition of an "independent" purpose to include a concurrent purpose that was not--in any ordinary sense of the term, and, more important, in the sense used in *Green*--a purpose "independent" of the murder. On the prosecutor's theory of the case, Clark intended to kill the entire family, including David Gawronski, directly by means of the fire. On Clark's theory of the case, he intended to kill David Gawronski indirectly by means of the fire, driving him out of the house so he could shoot him. On either theory, the arson was not "independent" of the murder; rather, under both theories, the arson was a means to kill David Gawronski.
>
> The Court dispensed entirely with the second requirement that the murder have the purpose of advancing the "independent felonious purpose" of the arson. There was never any contention--by either the prosecutor or Clark--that Clark murdered David Gawronski in order to advance his purpose of committing arson.
>
> Thus, in holding that Clark's arson was not "incidental" to the murder of David Gawronski, the California Supreme Court dramatically altered the interpretation of the special circumstance

> statute that it had previously provided in *Green*. Under the California Supreme Court's new interpretation of the felony-murder special circumstance statute, the *Green* instruction should have been given, but not for the reason advocated by Clark. Rather, according to the Court in *Clark*, the *Green* instruction should have been given to allow the jury to acquit on the special circumstance charge if it agreed with the prosecutor's theory of the case--that is, if it agreed that the fires had been set in order to kill the entire family in the house. If those had been the facts, the Court wrote, the arson would not have qualified as a special circumstance. But the Court held that the failure to give the *Green* instruction had been harmless because there was "overwhelming" evidence that Clark intended that the fires drive the family out of the house. 50 Cal.3d at 609, 268 Cal.Rptr. 399, 789 P.2d 127. Under the Court's new interpretation of the statute, Clark's purpose of driving the family out of the house now qualified as an "independent, albeit concurrent" purpose. *Id.*

Pet. App. at 17-18.

Reasons for Denying the Writ

The State's petition is a poor candidate for certiorari. The decision it asks this Court to review is a fact specific application of settled ex post facto principles. The Ninth Circuit panel decision was unanimous, and rehearing en banc was denied without a dissent from a single judge. Although the State uses language that evokes some of this Court's cases under the Antiterrorism and Effective Death Penalty Act ("AEPDA") by asserting that the Ninth Circuit second-guessed or substituted its judgement for that of the California Supreme Court, AEDPA does not apply to this case. Pet. App. at 8. The State does not argue that granting the petition is necessary to resolve a conflict among the federal Circuit Courts of Appeal, or that the challenged decision will "open the floodgates" to relief for other condemned inmates. Nor could the State reasonably make such arguments.

The challenged ex post facto decision is self-limiting. The Ninth Circuit's ex post facto holding means only that the State cannot apply the expanded arson special circumstance against Clark. Once the California Supreme Court announced its expanded construction of the arson special circumstance in 1990, when it denied Clark's direct appeal in a published decision (Pet. App. at 53-125), the State was free to apply that law prospectively against other criminal defendants, and it remains free to do so under the Ninth Circuit opinion. *Bouie*, 378 U.S. at 362.

The State's petition boils down to the mere assertion that the Ninth Circuit decided the case improperly as to Clark by misapplying a properly stated rule to the unusual facts of this case. Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). But the petition fails here, too. As shown below, contrary to the State's assertion, *Rogers v. Tennessee*, 532 U.S. 451 (2001), does not compel reversal; rather, the Ninth Circuit opinion is consistent with this Court's ex post fact jurisprudence.

Finally, the State has challenged only one of the two separate grounds for relief on which the lower court decision rests. The State does not challenge the holding that "the trial court's refusal to give the *Green*-based instruction" prejudicially violated Clark's due process rights by depriving him of "a meaningful opportunity to present a complete defense" under *California v. Trombetta*, 467 U.S. 479, 485 (1984). Pet. App. at 8, 25, 26. Instead, the State challenges only the alternative ground finding an ex post facto violation. The State has therefore waived any challenge to the jury instruction ruling, Supreme Court Rule 14.1(a), and the Ninth Circuit's grant of relief on that ground will stand regardless of whether the State's petition is granted. This is another reason for denying the petition.

Argument

I.

THE NINTH CIRCUIT PROPERLY GRANTED RELIEF ON THE EX POST FACTO CLAIM

A. AEDPA Does Not Apply to this Case

The petition contains language that evokes some of this Court's AEDPA cases by asserting that the Ninth Circuit substituted its judgment for that of the California Supreme Court and "second-guessed" the state court. Petition for Writ of Certiorari ("Cert. Pet.") at 3, 4, 6, 12; *cf. Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam) (reversing grant of penalty relief in capital habeas case under AEDPA because the Ninth Circuit "substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254," where the state court had denied the same claim after an evidentiary hearing). However, AEDPA does not apply to the case at bar, and the Ninth Circuit applied correct pre-AEDPA standards. Pet. App. at 8. The State does not contend otherwise. Moreover, the ex post facto claim was presented to the state supreme court in Clark's first state habeas corpus petition, and it was summarily denied two months later without an opinion or citation to authority. *In re Clark*, 5 Cal. 4th at 760-61; Respondent's Appendix ("Resp. App.") at 29. There is no state court opinion addressing the ex post facto claim.

B. *Rogers v. Tennessee* Does Not Compel Reversal; the Ninth Circuit Opinion Is Consistent with this Court's Ex Post Facto Jurisprudence

The State argues that "[t]he Ninth Circuit's opinion disregards this Court's directive in *Rogers v. Tennessee* to accommodate the state court's proper judicial function of clarifying and refining legal doctrines as new facts and circumstances present themselves." Cert. Pet. at 4. As shown below, the State's emphasis on *Rogers's* "directive" is exaggerated and misplaced.

Nothing in *Rogers* compels reversal of the Ninth Circuit opinion, and the opinion is consistent with this Court's ex post facto cases and principles.

As an initial matter, as purported evidence of the Ninth Circuit's alleged disregard of *Rogers*, the State complains that "the Ninth Circuit opinion barely mentions *Rogers*, relegating this Court's decision in that case to a mere 'see also' citation and a nested citation to *Bouie* in the midst of the decision below." Cert. Pet. at 11-12. However, the State failed to mention *Rogers* *at all* in its brief to the Ninth Circuit. Resp. App. at 42-50, 54. The State first mentioned *Rogers* by name in a letter of supplemental authorities submitted to the Ninth Circuit more than two months after oral argument, about eight months after it filed its appellee's brief, and almost four years after *Rogers* was issued. Resp. App. at 54; Fed. R. App. P. 28(j) (governing "citation of supplemental authorities"). Having itself "relegated" *Rogers* in the Ninth Circuit appeal to a post-argument letter of "supplemental" authorities, the State cannot be heard to complain that the Ninth Circuit opinion does not afford *Rogers* the prominence that the State now contends it deserves. In any event, *Rogers* does not compel reversal, and the Ninth Circuit's opinion is consistent with the principles set forth in *Rogers* and this Court's other ex post facto cases.

The State's question presented is: "Did the Ninth Circuit fail to afford the California Supreme Court the latitude required by *Rogers*?" Cert. Pet. at i. The State argues that "[t]he Ninth Circuit's opinion disregards this Court's directive in *Rogers v. Tennessee* to accommodate the state court's proper judicial function of clarifying and refining legal doctrines as new facts and circumstances present themselves." Cert. Pet. at 4. But *Rogers* itself emphasized that any such "directive" was made in a distinct context – common law rulemaking, and not the interpretation of a state special circumstance statute, as here – a context that distinguishes *Rogers*

from the case at bar.

Rogers "concern[ed] the constitutionality of the retroactive application of a judicial decision abolishing the common law 'year and a day rule.'" *Rogers*, 532 U.S. at 454. "At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act." *Id.* The Tennessee Supreme Court abolished the year and a day rule as it existed at common law and applied the decision to the criminal defendant to uphold his murder conviction. *Id.* This Court held that the retroactive application did not violate the ex post facto principles contained in the Due Process Clause of the Fourteenth Amendment. *Id.*

The Court rejected the argument that the Due Process Clause incorporates jot-for-jot the specific prohibitions of the Ex Post Facto Clause, art. I, § 10, cl. 1, as identified by Justice Chase in *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 2d 648 (1798) (*seriatim* opinion of Chase, J.). *Rogers*, 532 U.S. at 458-59.[3] The Court explained:

> [I]ncorporation of the *Calder* categories into due process

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[3]In *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648 (1798) (*seriatim* opinion of Chase, J.), Justice Chase identified four types of laws to which the Ex Post Facto clause, art. I, § 10, cl. 1, extends:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id.; *Rogers*, 532 U.S. at 456.

> limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system.
>
> *That is particularly so where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging. In the context of common law doctrines* (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. . . . Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.

Rogers, 532 U.S. at 461 (emphasis added).

Here, by contrast, the Ninth Circuit did not apply ex post facto principles to an act of state common law judging, but to a state court's interpretation of the special circumstance statute on which Clark's eligibility for the death penalty turned. Pet. App. at 8. Further, the California Supreme Court explained that its narrowing construction of the special circumstance statute in *Green* -- which that court later improperly, retroactively expanded and applied against Clark -- was made "in order to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), that 'each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not.'" Pet. App. at 10; *Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995).

The policy concern expressed in *Rogers* about overly stringent application of ex post facto principles is lessened where, as here, the state judicial decision at issue involves the

interpretation of a statute rather than a change in a common law rule. *Rogers*, 532 U.S. at 464 ("This case, however [unlike *Bouie*], involves not the precise meaning of the words of a particular statute, but rather the continuing viability of a common law rule."). The State's emphasis on *Rogers* is thus exaggerated and misplaced. Just as *Rogers*'s policy concern does not compel reversal of the Ninth Circuit opinion, neither does the legal principles it explicated or its holding.

Rogers reaffirmed that "limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process." *Rogers*, 532 U.S. at 456. It also reaffirmed the ex post facto principles set forth in *Bouie* and explained that *Bouie*'s "rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." *Id.* at 459. According to *Rogers*, *Bouie* "noted that this Court has often recognized the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime,'" and that "deprivation of the right to fair warning" can result "from an unforeseeable and retroactive judicial expansion of statutory language . . . ." *Id.* at 457. *Rogers* described this Court's post-*Bouie* ex post facto cases as applying "*Bouie*'s check on retroactive judicial decisionmaking . . . in accordance with the . . . basic and general principle of fair warning that *Bouie* so clearly articulated." 532 U.S. at 459. It described with approval a case holding that a "trial court's construction of the term 'arrest' as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process" (*Douglass v. Buder*, 412 U.S. 430, 432 (1973) (per curiam); and another case "reversing [a] conviction under state obscenity law because it did 'not give fair notice' that the location of the allegedly obscene exhibition was a vital element of the offense" (*Rabe v. Washington*, 405

U.S. 313, 316 (1972) (per curiam)).

In the opinion below, the Ninth Circuit cited and applied the ex post facto principles set forth in *Bouie* and *Rogers*. *See, e.g.*, Pet. App. at 18 ("An unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct. See *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (*Bouie* articulated a 'basic and general principle of fair warning')."; Pet. App. at 25 ("This new interpretation and its retroactive application were 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.' *Rogers*, 532 U.S. at 461 (quoting *Bouie*, 378 U.S. at 354)."). Although the State argues that the Ninth Circuit failed to afford the state supreme court the "latitude" purportedly required by *Rogers*, it does not contend that the Ninth Circuit cited or applied incorrect rules of ex post facto law.[4]

Nor does the holding of *Rogers* help the State. In concluding that the retroactive abolition of the year and a day rule did not violate due process, this Court emphasized that "[t]he year and a day rule is widely viewed as an outdated relic of the common law"; had been rendered obsolete by advances in medicine and science; had been abolished in the vast majority of

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[4]The State does not contend that ex post facto principles do not apply to forbid a retroactive, judicial expansion of a special circumstance statute. This Court has repeatedly held that ex post facto principles protect against a change in law that aggravates a crime or results in greater punishment than when the crime was committed. *See, e.g., Lynch v. Mathis*, 519 U.S. 433, 441 (1997) ("The bulk of our *ex post facto* jurisprudence has involved claims that a law has inflicted 'a greater punishment, than the law annexed to the crime, when committed. . . .' We have explained that such laws implicate the central concern of the *Ex Post Facto* Clause . . . ."); *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995) ("we have held that the Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts"); Pet. App. at 19-20.

jurisdictions to recently have addressed the issue; and "had never once served as a ground of decision in any prosecution for murder in the State" of Tennessee since it was first mentioned by the Tennessee Supreme Court nearly a century earlier. *Rogers*, 532 U.S. at 462-64; *id.* at 466 (the year and a day rule "was a principle in name only, having never once been enforced in the State"). "There [wa]s, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Id.* at 466-67.

Here, by contrast, and as explained further below, at the time of Clark's crime in January 1982, the *Green* rule was not an "outdated relic of the common law" that had never been applied, but rather a narrowing construction of a special circumstance statute that had been articulated, followed and established in three state appellate decisions, *Green*, 27 Cal. 3d 1, *People v. Thompson*, 27 Cal. 3d 303, 325, 611 P.2d 883, 165 Cal. Rptr. 289 (1980), and *Ario v. Superior Court*, 124 Cal. App. 3d 285, 287, 177 Cal. Rptr. 265 (1981), and incorporated into the relevant standard jury instruction. Pet. App. at 20-25.

C. None of the State's Other Arguments Has Merit

The State argues that "the Ninth Circuit's opinion imposed its own, rigid and formulaic interpretation of California law, and anomalously faulted the state supreme court from straying from that formulation." Cert. Pet. at 12; *see also id.* at 4 (accusing the Ninth Circuit of "adopt[ing] its own competing and static interpretation of California law at the time of the crime"); *id.* at 12 ("the Ninth Circuit focused on whether *its own* interpretation of California law was *more* defensible or foreseeable than that adopted by the state supreme court on Clark's appeal") (emphasis in original) (footnote omitted).

Far from crafting its own interpretation of state law, the Ninth Circuit's ex post facto analysis took as its point of departure the concurring and dissenting opinion of two California Supreme Court justices that showed that the majority in the *Clark* appeal had substantially reinterpreted *Green* to find Clark death-eligible. Pet. App. at 18, 108-10. Justices Broussard and Mosk explained that under *Green*, the majority's analysis was "plainly wrong on two counts." First,

> [u]nder the reasoning of the prosecutor, the implied findings of the jury, and the majority's own words, when defendant set fire to the gasoline in the Gawronski home – and thus when the burning commenced – his intent was to kill the family members by burning . . . . When defendant actually committed the crime of arson, he did so intending to kill the victims by burning, and had no independent purpose for his action.

Pet. App. at 108-09.

Second, under the defense theory of the case and the defense evidence, "even if defendant set the fire to cause the Gawronskis to go to a place where he could shoot and kill David, that would not constitute an independent felonious purpose under the reasoning of *Green*, *supra*, 27 Cal.3d 1." Pet. App. at 109. "[I]f, as here, the defendant's purpose in setting the fire is not to destroy property, but to drive the intended victim to a place where defendant can more easily kill him, the felony lacks a purpose independent from the murder, and cannot support a felony-murder special circumstance." *Id.* Thus, the Ninth Circuit's ex post facto analysis was based not only on its own fair reading of the relevant state law,[5] but also on the opinions of two state

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[5]*Carmell v. Texas*, 529 U.S. 513, 544 n.31 (2000) ("Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause . . . is a federal question we determine for ourselves."); *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("whether the standards of punishment set up before and after the commission of an offense differ, and whether the latter is (continued...)

supreme court justices who identified the same misinterpretation of the *Green* rule by the majority in Clark's direct appeal.

The State accuses the Ninth Circuit of "picking and choosing among state authorities" to "adopt[] its own competing and static interpretation of California law at the time of the crime . . . ." Cert. Pet. at 4; *see also id.* at 12 n.4. The Ninth Circuit did no such thing. It carefully analyzed and thoroughly discussed "the relevant, or possibly relevant, cases decided between the date of the [California Supreme] Court's decision in *Green* (April 24, 1980) and the date of Clark's crime (January 6, 1982)": *Green*, 27 Cal. 3d 1; *Thompson*, 27 Cal. 3d 303; and *Ario*, 124 Cal. App. 3d 285. Pet. App. at 20-22. The court also extensively discussed *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), a case cited by the State in support of its position. *Id.* at 22-23. The Ninth Circuit correctly concluded that those "decisions of the California appellate courts indicate that, at the time Clark committed his crimes, *Green*'s interpretation of the felony-murder special circumstance statute was well-established, and that the California Supreme Court's new interpretation of that statute in *Clark* was unforeseeable." *Id.* at 20.

The State asserts that *Green* is "a capital case with very peculiar facts distinguishable from those in respondent's case." Cert. Pet. at 6. The State is wrong. *Green* vacated a robbery special circumstance finding because the robbery was merely incidental to the murder. 27 Cal. 3d at 61, 74. In *Green*, the defendant killed his wife out of jealousy and/or revenge. *Id.* at 55. Before killing his wife, defendant took some of her clothing; after the murder he took her rings

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[5](...continued)
more onerous then the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself").

and purse, burned her purse and clothing, and attempted to fire a shotgun at an identifying tattoo on her abdomen. *Id.* at 55-57. Thus, the California Supreme Court concluded, the object of the robbery was to facilitate or conceal the primary crime of murder, not to steal. *Id.* at 61. The crime "was not in fact a murder in the commission of a robbery but the exact opposite, a robbery in the commission of a murder. Yet the jury nevertheless found the special circumstance to be true." *Id.* at 60.

Similarly here, the crime "was not in fact a murder in the commission of [an arson] but the exact opposite, [an arson] in the commission of a murder." As Justice Broussard explained in his dissent in the direct appeal, under *Green* the arson special circumstance did not apply to Clark under either the prosecution or defense theories of the case because, under both, the arson was incidental to the primary goal of murder. Pet. App. at 17, 108-10. Clark testified, consistently with his post-arrest statement, that he set fire to the house to drive the Gawronskis out the front door, where he planned to shoot David in front of Ava. The prosecution argued that Clark set fire to the house intending to kill the inhabitants. Thus, the arson was intended to facilitate the primary goal of murder (the defense theory) or as a means to commit murder (the prosecution theory). Under both theories, and the evidence, Clark's primary purpose was murder, and the arson was merely incidental to it.

The State contends that *Thompson*, 27 Cal. 3d 303, "also involved unusual facts different from those in this case." Cert. Pet. at 7; *see id.* ("Both *Green* and *Thompson* presented extreme cases with unusual facts."). In fact, *Thompson*, like *Green*, is similar to the case at bar. In *Thompson*, the California Supreme Court held that there was insufficient evidence to support the jury's findings that robbery and burglary special circumstances were true. The defendant had

entered a home, demanded and took a set of car keys, and shot the inhabitants, stating "you know why I'm here and you know who sent me." 27 Cal. 3d at 310, 323-24. Because defendant arrived at the house on foot "he had a motive to take a car simply to effect his getaway from the shootings he intended." *Id.* at 324. Property gain was at most of "secondary importance" to the primary, if not exclusive, intent to kill, and therefore the burglary and robbery special circumstances did not apply. *Id.*

Despite the obvious similarities among *Green*, *Thompson* and the case at bar, the State tries to distinguish the cases by claiming that in *Green* and *Thompson*, "[n]either of the defendants had any genuine intent to commit robbery at all; their 'sole objective' was murder." Cert. Pet. at 7-8. But the same is true here: under both the prosecution and defense theories of the case, there was no evidence of any genuine intent to commit arson; the sole objective was murder, either by the fire itself (the prosecution theory) or by driving the people out of the house to shoot and kill David Gawronski (the defense theory).[6]

The State criticizes the Ninth Circuit for "amplif[ying] the importance of a lower state appellate court decision, *Ario v. Superior Court*, 124 Cal. App. 3d 285, 287 [177 Cal. Rptr. 265], (1981), while curiously downplaying the significance of *Murtishaw*, a California Supreme Court case expressly distinguishing *Green*." Cert. Pet. at 12 n.4. According to the State, this is further evidence that "the opinion appears to pick and choose among state court authorities in order to demonstrate that *its own* interpretation of California law was foreseeable and defensible." *Id.*

---

[6]As the State concedes, "[a]ccording to Clark's statements to police and his trial testimony, his intent in setting the fire was not to burn David or the other family members to death, but instead to drive the entire family out of the house so that he then could shoot and kill David in front of his wife and child." Cert. Pet. at 2.

The Ninth Circuit rightly focused on *Ario* because, like *Green* and *Thompson*, but unlike *Murtishaw*, *Ario* applied *Green*'s narrowing construction of the special circumstance statute before the time of Clark's crime. *Ario* dismissed a kidnaping special circumstance allegation because "[t]he only evidence concerning the interplay between kidnaping and murder is that the murder plan was settled at the house, and the transportation [of the victims from the house] to Redwood Road was for the purpose of accomplishing the murders." 124 Cal. App. 3d at 289. The kidnaping was thus incidental to the murder, just as the robberies were incidental in *Green* and *Thompson*.[7]

There is nothing "curious" about the Ninth Circuit's "downplaying the significance of *Murtishaw*." Pet. Cert. at 12 n.4. As the Ninth Circuit explained, "*Murtishaw* involved the felony-murder rule rather than the felony-murder special circumstance statute." Pet. App. at 22. "The difference between the two is significant. The felony-murder rule broadens criminal liability, imposing a kind of vicarious liability for murders that occur during the commission of a felony," and making a defendant potentially liable for murder even when he is not the actual killer. *Id.*

> The felony-murder special circumstance statute, by contrast, narrows criminal liability, allowing capital punishment for a certain restricted class of murders. Under the felony-murder special circumstance statute as defined in *Green*, a defendant is not death-eligible for ordinary felony murder. Rather, he is death-eligible only if the murder advances an independent felonious purpose, such as the murder of a witness to a felony in order to avoid identification.

Id.

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[7]This Court analyzed decisions by Tennessee intermediate appellate courts as part of its ex post facto analysis in *Rogers*. 532 U.S. at 465-66.

As the Ninth Circuit explained, *Murtishaw* held that there was sufficient evidence to support a felony-murder conviction because the jury could have concluded that the defendant acted with the concurrent goals of killing the victims and taking their car. 29 Cal. 3d at 752; Pet. App. at 22. In footnote 13 of the opinion, the state supreme court took care to distinguish *Green* by explaining that the theft was not ancillary to the murder, but if the witness's testimony was believed, it was a concurrent objective. 29 Cal. 3d at 752 n.13; Pet. App. at 22. The state supreme court "had been careful to state that the issue in *Murtishaw* was first-degree felony murder, not felony-murder special circumstance." Pet. App. at 22 (citing *Murtishaw*, 29 Cal. 3d at 750-51). Footnote 13 "insured that the reader understood that the two were different." Pet. App. at 22. Further, as the Ninth Circuit noted, "[b]ecause the death penalty is not at stake in a simple felony-murder case" – felony murder, without more, does not make a defendant death-eligible – the requirements of *Furman* and *Gregg* – which animated the narrowing construction of the special circumstance statute in *Green* – were not in play in *Murtishaw*. Pet. App. at 22-23.

Thus, contrary to the State's assertion, *Murtishaw* did not give fair warning that, contrary to the published opinions expressly on point at the time of Clark's crime, *Green*, *Thompson* and *Ario*, the California Supreme Court would expand *Green*'s definition of the special circumstance statute in deciding Clark's case. Pet. App. at 23. As the Ninth Circuit rightly noted, there was no discussion in *Green*, *Thompson* or *Ario* of concurrent purposes whatsoever, much less a warning that a defendant with concurrent goals to commit murder and another felony would be death-eligible under the special circumstance statute. Pet. App. at 21-22. Further, although *Murtishaw* was issued before *Ario*, *Robertson* and *Clark* (*Murtishaw* postdated *Green* and *Thompson*), neither *Ario*, *Robertson* nor *Clark* mentioned *Murtishaw*. *Id.* at 23.

The only case cited by the majority in *Clark* in support of its expanded interpretation of the special circumstance statute was *Robertson*, which was issued nearly a year after Clark's crimes, Pet. App. at 23, and therefore could not possibly have provided fair warning. *Bouie*, 378 U.S. at 350, 355; *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005) (per curiam) (cited by the State); Pet. App. at 20. Further, *Robertson* distinguished *Green* on the basis that in *Robertson* the "intent to steal was entirely independent of the murders," 33 Cal. 3d at 52, and thus it applied *Green* in an entirely predictable way that did not give fair warning of the substantial modification of *Green* that would come in Clark's appeal. Pet. App. at 24.

Moreover, as the Ninth Circuit noted, the standard special circumstance jury instruction at the time of Clark's trial, CALJIC 8.81.17, specifically incorporated *Green*'s holding. Pet App. at 24. The existence and wide publication of this standard instruction is powerful evidence of foreseeability that the *Green* rule would be applied. *Id.* However, after Clark's trial the standard instruction was amended to include a comment stating that "[c]oncurrent intent to kill and commit an independent felony will support a felony-murder special circumstance." The two cases cited in support of the modification are *Clark* and *People v. Raley*, 2 Cal. 4th 870, 903 (1992), a California Supreme Court case relying on *Clark*. *Id.* "No pre-*Clark* case is cited." *Id.* This is additional strong evidence that the concept that "concurrent purposes" would support a special circumstance finding did not exist prior to the direct appeal opinion in *Clark*, or at the time of Clark's crimes or trial. *Id.*

Thus, as shown above, all of the relevant published felony-special circumstance cases at the time of Clark's crimes support the Ninth Circuit's ex post facto decision. Although the State accuses the Ninth Circuit of "picking and choosing" among state court decisions to support its

decision, the State has picked and chosen a slew of irrelevant cases, including vacated and depublished opinions, to try to prop up its position. The State cites *People v. Smith*, 186 Cal. Rptr. 650 (1982), *People v. Williams*, 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988), *People v. Hernandez*, 47 Cal. 3d 315, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988), *Robertson*, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982), *People v. Kimble*, 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988), *People v. Sanders*, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990), and *People v. Sheppard*, 192 Cal. Rptr. 427 (1983), for a number of propositions. Cert. Pet. at 8-10 & nn.1-2. But all of these cases post-date Clark's crimes, and therefore these cases are irrelevant for ex post facto purposes. *Bouie*, 378 U.S. at 350, 355; *Bradshaw*, 126 S. Ct. at 605; Pet. App. at 20.

Two of the State's cases – *Smith* and *Sheppard* – were vacated soon after they were issued (*Sheppard* was ordered depublished by the California Supreme Court), Cert. Pet. at 8 n.1, 10 n.2, meaning that they could not (and cannot) be cited as good law. Cal. Rule of Court 977(a). Although the State purports to cite these cases for the proposition that the *Green* rule's application to "concurrent intent" cases was "unsettled" "close to the time of Clark's crime," Cert. Pet. at 8 n.1, 10 n.2, their vacation and depublication prove the opposite: that people could not rely on these cases (attorneys were forbidden from citing them), and that *Green* and its progeny remained good law.

The State cites *Smith* for the proposition that it cited "*Murtishaw* as authority that 'concurrent motivations' – killing the victim both for personal revenge and to facilitate robbery – satisfied the *Green* rule with respect to the felony-murder special circumstance." Cert. Pet. at 9. However, *Smith* actually stated that "[h]ad Smith asked for the paragraph 2 instruction [of

CALJIC 8.81.17], we would be inclined to hold that the trial court erred in failing to give it." 186 Cal. Rptr. at 660. However, the defendant did not request the instruction. *Id.* The *Smith* court also explained that "if during the commission of a robbery or other enumerated felony one of the defendants decides to kill the victim for a purpose independent of the underlying felony, the spirit if not the letter of the *Green* court's decision would suggest the special circumstance finding cannot be sustained." *Id.*

Sheppard was a kidnaping special circumstance case that declined to follow *Ario*. 192 Cal. Rptr. at 432 n.3. The California Supreme Court depublished *Sheppard*, while *Ario* remained good law.

The State cites *Williams*, 44 Cal. 3d 883, a case decided six years after Clark's crimes, as "citing *Murtishaw* as authority regarding [the] *Green* rule in [the] context of the felony-murder special circumstance." Cert. Pet. at 9. However, the *Williams* court emphasized that "[t]he trial took place prior to our decision in *Green*," and that "unlike *Green* . . . where the robbery was an opportunistic crime committed incidentally during the murder, here the inescapable conclusion is that the kidnapping had an independent, rather than incidental purpose." 44 Cal. 3d at 928-29.

The State cites *Hernandez*, 47 Cal. 3d 315, a case decided more than six years after Clark's crimes, as "discussing *Green* in [the] context of [the] first degree felony-murder statute, rather than felony-murder special circumstance." Cert. Pet. at 9. But *Hernandez* distinguished *Green*, explaining that "the sexual offenses were not incidental events or afterthoughts." 47 Cal. 3d at 348.

The State cites *Robertson* for the proposition that the "the incidental robbery theory of *Green* is not a general principle of law closely and openly connected with the facts before the

court to support a *sua sponte* duty to instruct." Cert. Pet. at 9 (quotations omitted). However, the full quote from *Robertson* is: "In light of the significant differences between the facts of this case and *Green*, however, we do not believe that that case's 'incidental robbery' doctrine can properly be characterized as a general principle of law 'closely and openly connected with the facts before the court' . . . as to which a *sua sponte* duty to instruct could arise." 33 Cal. 3d at 52. By contrast, in the case at bar, Clark requested a *Green* instruction, and the state supreme court held that under the evidence presented at trial, it was error to deny the request.

Kimble, 44 Cal. 3d, another case decided more than six years after Clark's crimes, is cited for the proposition that the "*Green* theory [is] not an 'element' of a special circumstance." Cert. Pet. at 9. However, the complete quote from *Kimble* is: "Preliminarily, we reject the dissent's novel suggestion that *Green*'s clarification of the scope of the felony-murder special circumstances has somehow become an 'element' of such special circumstances, on which the jury must be instructed in all cases regardless of whether the *evidence* supports such an instruction." 44 Cal. 3d at 501 (emphasis in original). Again, Clark requested a *Green* instruction, and the state supreme court held it was error to deny the instruction given the evidence presented at trial.

The State cites a case decided after Clark's appeal, *Sanders*, 51 Cal. 3d 471, as "refusing to extend *Green* to [a] witness-killing special circumstance; [the] special circumstance [was] applicable even if defendant also harbored a second purpose for killing the witness-victim." Cert. Pet. at 10. But the *Sanders* court explained that it could not "conceive of a situation in which the motive to kill a witness is merely 'incidental' to the crime," and it explicitly contrasted the robbery in *Green* as an example of a situation where the felony could be (and was) incidental

to the murder. 51 Cal. 3d at 519-20.

The State cites *Webster v. Woodford*, 369 F.3d 1062 (9th Cir. 2004), for the proposition that "it was foreseeable, for *Bouie* purposes, that [the] state court's interpretation of lying-in-wait for purposes of [the] first degree murder statute would be imported into [the] lying-in-wait special circumstance statute." Cert. Pet. at 8. *Webster* is distinguishable from the case at bar.

Webster rejected a claim that the application of robbery and lying in wait special circumstances violated the ban on ex post facto laws. The defendant, Webster, "argue[d] that the theft of the car, which was the primary focus of the proof, did not occur within the 'immediate presence' of his victim and that no judicial construction of the phrase put him on notice that the courts would consider taking property a quarter mile away as being within a victim's 'immediate presence.'" 369 F.3d at 1070. However, Webster was on fair notice of the application of this principle to him, because "California had previously interpreted the phrase 'immediate presence' to include situations in which the taking was outside the victim's sensory perception." *Id.* at 1071. The court emphasized that "[t]he first significant case leading to this interpretation [was] *People v. Lavender*, 137 Cal. App. 582, 31 P.2d 439 (1934)," decided almost half a century before Webster's crime.

Webster's second claim was that the lying-in-wait special circumstance required "physical" concealment on the part of the defendant. 369 F.3d at 1073. The three elements of the special circumstance are concealment, watching and waiting. *Id.* The court ruled that due process was not violated by the failure to require physical concealment, since several California Supreme Court decisions before Webster's crimes "substituted the term 'secrecy' for 'concealment,'" and the language of the jury instructions in his case – allowing a true finding on

the basis of "a concealment by ambush or some other secret design" – was cited with approval in a case over 20 years before his crimes. *Id.* at 1073-74. Further, the CALJIC instructions given at Webster's trial and incorporating this law were adopted several years before his crimes. *Id.* at 1074. "Given the existence and wide publication of this standard instruction, it was foreseeable that it would be applied." *Id.*

The State cites *Bradshaw v. Richey*, 126 S. Ct. 602, for the point that the due process right to notice requires only "reasonable warning" and does not require "fundamentally similar cases." Pet. Cert. at 5.[8] *Bradshaw* does not show that Clark had reasonable warning that the arson special circumstance would be expanded to make him death-eligible. In *Bradshaw*, the evidence at trial showed that the defendant intended to kill his ex-girlfriend and her new boyfriend, but instead his intended victims escaped harm and a two-year old was killed. 126 S. Ct. at 603. Defendant was convicted of aggravated felony murder on a theory of transferred intent. *Id. Bradshaw* rejected the defendant's ex post facto claim because the defendant "could not plausibly claim unfair surprise that the doctrine [of transferred intent] applied in his case." 126 S. Ct. at 604. This was because the relevant statute at the time of the offense stated that "'no person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death *of another*.'" *Id.* (original emphasis). This Court explained that defendant's "intention to kill his ex-girlfriend and her boyfriend plainly came within this provision. There was no reason to read 'another' (countertextually) as meaning only 'the actual victim,' since the doctrine of transferred intent was 'firmly rooted in Ohio law.'" *Id.* (citing Ohio cases). *Bradshaw* did not involve the situation presented here, where a narrowing construction of the

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[8]The State mistakenly refers to *Bradshaw* as "*Bradford v. Richey*." *Id.*

relevant statute by the state supreme court changed the meaning of the statute as written and was the operative law at the time of the offense, as reflected in published caselaw and the relevant standard jury instruction.

Finally, the State argues that "[i]t strains credulity that respondent . . . somehow had relied on the new and anomalous *Green* rule when he committed his horrific crimes." Cert. Pet. at 12. However, the State concedes that Clark's trial testimony regarding his purpose in committing the crimes was consistent with his post-arrest statement to the police, *id.* at 2, and thus there is no suggestion that the defense presented at trial was inconsistent with Clark's spontaneous and contemporaneous explanation of his intent. Further, as *Bouie* explains, "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of the subjective expectations of particular defendants." 378 U.S. at 347 n.5. In *Bouie*, the petitioners who won an ex post facto challenge to a trespass statute "at one point testified that they had intended to be arrested" when they engaged in conduct the statute was later held to reach. *Id.* "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his life or liberty." *Carmell*, 529 U.S. at 533.

II.

THE STATE HAS CHALLENGED JUST ONE OF THE TWO SEPARATE GROUNDS FOR RELIEF, AND THUS THE NINTH CIRCUIT'S JUDGMENT WILL STAND AS TO CLARK REGARDLESS OF WHETHER THE COURT GRANTS THE STATE'S PETITION

As noted above, Clark asserted in his federal habeas petition and argued in the courts below that the arson special circumstance violated due process for two distinct reasons: First,

> that the trial court's failure to give his requested jury instruction under *Green* violated due process under *California v. Trombetta*, 467 U.S. 479, 485 (1984), by unfairly depriving him of a "meaningful opportunity to present a complete defense." Second, he argue[d] that the California Supreme Court's expansion of *Green* and reinterpretation of the felony-murder special circumstance statute was an unforeseeable new interpretation of California law, and that the retroactive application of this new interpretation on appeal violated due process under *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

Pet. App. at 8.

The parties understood that Clark was making two distinct claims. Resp. App. at 33, 35 (Clark's opening brief in the Ninth Circuit argued that "the district court erred by denying Clark's jury instruction claim"; then, under a separate heading, Clark argued that "[t]he arson special circumstance finding and resulting judgment are invalid for *the additional reason* that the state supreme court's decision in *Clark*, retroactively expanded the reach of the special circumstance statute to include Petitioner's conduct") (emphasis added); Resp. App. at 51 (The State's appellee's brief in the Ninth Circuit explained: "Clark contends the trial court violated due process by refusing to give a requested special instruction on the 'independent felonious purpose' requirement of the arson special circumstance. (AOB 59-80.) *Clark also claims* the California Supreme Court retroactively expanded the interpretation of that requirement in order to affirm his

conviction on appeal, in violation of due process. (AOB 81-86.)." (Emphasis added.)

The Ninth Circuit "agree[d] with both of Clark's contentions" and granted relief on the basis of each of these separate but "interrelated" grounds. Pet. App. at 8, 25, 26.

The State's petition, however, challenges only one of the bases for the Ninth Circuit's judgment, the grant of relief based on the ex post facto violation. The question presented, and the entire petition, argues that "the Ninth Circuit fail[ed] to afford the California Supreme Court the latitude" purportedly required by *Rogers*, 532 U.S. 451, an ex post facto case. Nowhere does the State argue that the Ninth Circuit wrongly granted relief on the separate ground that the failure to give Clark's requested *Green* instruction violated his right to present a defense under *Trombetta*. Accordingly, the State has waived any such argument,[9] and the Ninth Circuit's judgment will stand regardless of whether the State's petition is granted. Because resolution of the petition, even in the State's favor, will not affect the outcome of the case, it would be inappropriate to grant certiorari. *Cf.* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* (8th ed. 2002) 231 (explaining that even where, unlike this case, the petition addresses a clear conflict of law among the federal Circuit Courts of Appeal, "[i]f the resolution of the clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied").

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[9]Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (certiorari improvidently granted where Rule 14.1(a) requires that a subsidiary question be fairly included within the question presented for Court's review); *id.* at 34 ("Faithful application [of Rule 14.1] will also inform those who seek review here that we continue to strongly disapprove the practice of smuggling additional questions into a case after we grant certiorari.").

Conclusion

For the foregoing reasons, the Court should deny the State's petition.

Dated: October 6, 2006

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

By _____
MARK R. DROZDOWSKI
Deputy Federal Public Defender

Counsel for Respondent
WILLIAM CLARK

Respondent's Appendix

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SUPREME COURT
FILED
MAY 16 1991
Robert Wandruff Clerk
DEPUTY

No. S020060

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE WILLIAM JOHN CLARK

ON

HABEAS CORPUS

The order filed on May 1, 1991, in the above-entitled case is vacated. The request for an extension of time to file a reply is denied. The petition for writ of habeas corpus is denied.

Mosk, J. and Broussard, J. are of the opinion the request should be granted.

Acting Chief Justice

COURT OF APPEALS NO. 02-99007

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM CLARK, Petitioner and Appellant, v. JEANNE WOODFORD, Warden of California State Prison at San Quentin, Respondent and Appellee.	)	(DC # CV 95-334 DOC)

Appeal from the United States District Court
Central District of California
The Honorable David Carter

APPELLANT'S BRIEF
DEATH PENALTY CASE

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rendering a finding of law based on inaccurate conclusions regarding his competency and sanity").

Instead, Clark was allowed to represent himself in a life or death trial, resulting in a wholly unreliable proceeding with essentially two prosecutors and no defense. Massie, 624 F.2d at 74.

The district court erred in denying Claim 6. At a minimum, it should have held a hearing on the claim. Matheny v. Anderson, 253 F.3d 1025, 1040 (7th Cir. 2001); Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990) ("'[W]here a petitioner raises a colorable claim of ineffective assistance of counsel and there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing.'").

III. The District Court Erred by Denying Clark's Jury Instruction Claim

A. Summary of Claim and State Court Rulings

Claim 1 alleges that the arson special circumstance and resulting judgment must be reversed because they violate Petitioner's rights to due process, a fair trial, and the effective assistance of counsel; his privilege against self-incrimination; and the ban on ex post facto laws. ER 277-95. The arson special circumstance is the sole special circumstance making Clark eligible for the death penalty; the

purpose in setting fire to the Gawronskis' house," and that the state court ruling was not "so arbitrary or capricious" as to violate Clark's rights. ER 803-05.

2. The Failure To Give the Green Instruction Violated Due Process

The caselaw makes clear that the refusal to give Clark's proposed instruction deprived him of a defense and violated due process. In Bradley, this Court granted a habeas petition under the more stringent AEDPA standards on the ground that "[t]he failure to instruct the jury on entrapment deprived Bradley of his due process right to present a full defense." 315 F.3d at 1098. Bradley had confessed to a drug trafficking charge, and his only defense was entrapment. Id. at 1099. Although defense counsel emphasized in his closing argument the officers' "despicable tactics," "because of the court's refusal to instruct on entrapment, he could not point to a legal grounds on which the jury could acquit Bradley if it agreed." Id. (footnote omitted). Similarly, Clark's counsel argued in closing that the arson was incidental to the murder, but without the Green instruction the jury could not know that this argument was even legally relevant.

In McNeil v. Middleton, 344 F.3d 988, 990-91, 997 (2003), this Court held under AEDPA that a murder defendant's due process rights were violated by the trial court's erroneous imperfect self-defense instruction, which prevented the jury from considering one of petitioner's two possible defenses.

F. The California Supreme Court's Decision in Clark's Appeal Expanded the Reach of the Arson Special Circumstance Law in Violation of Due Process and the Ban on Ex Post Facto Laws

The arson special circumstance finding and resulting judgment are invalid for the additional reason that the state supreme court's decision in Clark, retroactively expanded the reach of the special circumstance statute to include Petitioner's conduct. ER 289-90.

Due process protects defendants against the retroactive application of an unexpected change in criminal law ("ex post facto" laws). Bouie v. City of Columbia, 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). This principle applies not only to laws that criminalize previously innocent behavior, but also to laws "which make[] more burdensome the punishment of a crime, after its commission, or which deprive[] one charged with crime of any defense available according to law at the time when the act was committed." Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); Murtishaw v. Woodford, 255 F.3d 926, 965 (9th Cir. 2001) (ex post facto ban prohibits retroactive imposition of "more onerous" standards).

"An unforeseeable judicial construction of a statute may run afoul of the Due Process Clause because of the same policy underlying the Ex Post Facto Clause-- lack of 'fair warning of that conduct which will give rise to criminal

CONCLUSION

For the foregoing reasons, Clark requests that the Court grant his petition and order a new guilt and/or penalty trial. In the alternative, Clark requests that the Court remand the case to district court for a hearing on Claims 5 and/or 6.

Dated: January 20, 2004

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

By _____
MARK R. DROZDOWSKI
Deputy Federal Public Defender

Attorneys for Petitioner-Appellant
WILLIAM CLARK

CERTIFICATE OF SERVICE

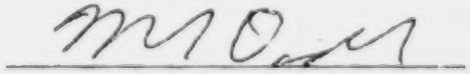
I, Mark Drozdowski, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Federal Public Defender's Office, 321 East 2nd Street, Los Angeles, California 90012; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bars of the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, at whose direction the service described herein was made.

On January 20, 2004, I served the within **APPELLANT'S BRIEF** on the interested parties herein by placing two copies thereof in an envelope, and I served the **EXCERPTS OF RECORD, VOLUMES 1-4** on the interested parties herein by placing one copy thereof in an envelope. Depositing both envelopes in the United States Mail, with postage fully prepaid thereon, at Los Angeles, California, addressed as follows:

Scott A. Taryle
Office of the Attorney General
300 South Spring Street, Ste. 500 N
Los Angeles, California 90013-1230

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 20, 2004, at Los Angeles, California.



Mark Drozdowski

02-99007

CAP

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG 13 2004

WILLIAM CLARK, Petitioner-Appellant, v. **JEANNE WOODFORD, Warden,** Respondent-Appellee.	**CAPITAL CASE**

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ON / /

On Appeal from the United States District Court
for the Central District of California; No. CV-95-334-DOC
The Honorable David O. Carter, Judge

APPELLEE'S BRIEF

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IV.

NEITHER THE FAILURE TO GIVE A JURY INSTRUCTION ON THE "INDEPENDENT FELONIOUS PURPOSE" REQUIREMENT, NOR THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF THAT REQUIREMENT ON APPEAL, VIOLATED DUE PROCESS

Clark contends the trial court violated due process by refusing to give a requested special instruction on the "independent felonious purpose" requirement of the arson special circumstance. (AOB 59-80.) Clark also claims the California Supreme Court retroactively expanded the interpretation of that requirement in order to affirm his conviction on appeal, in violation of due process. (AOB 81-86.) Respondent disagrees. As shown below, the district court properly granted summary judgment to Respondent on these claims.

A. Background

California Penal Code section 190.2(a)(17) provides for a death-qualifying special circumstance in murder cases, where the jury finds:

> The murder was committed while the defendant was engaged in or was an accomplice in the commission of, or the immediate flight after committing or attempting to commit the following felonies: . . . (viii) Arson in violation of Section 447.

CONCLUSION

For the reasons discussed above, the district court's judgment denying a writ of habeas corpus should be affirmed.

Dated: August 13, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

Scott Taryle

SCOTT A. TARYLE
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Attorneys for Respondent-Appellee

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00002215-LA2002XF0004

DECLARATION OF SERVICE

Case Name: ***William Clark v. Jeanne Woodford, Warden of California State Prison at San Quentin***
Case No: **02-99007**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 13, 2004,** I placed a copy of the attached

APPELLEE'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Sean K. Kennedy
Mark R. Drozdowski
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, CA 90012

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **August 13, 2004**, at Los Angeles, California.

Edith Marroquin-Obeso
Declarant

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BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

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April 21, 2005

Cathy Catterson, Clerk
U.S. Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

RE: *William Clark v. Jill Brown*, 9th Cir. No. 02-99007 - **Capital Case**

Dear Ms. Catterson:

Pursuant to Federal Rule of Appellate Procedure 28(j), Respondent submits the following discussion of supplemental authorities.[1/]

***Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).**

In this case, which Respondent's counsel mentioned at oral argument but not in the briefs, the Supreme Court examined the standard applicable to claims under *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), that a state court's retroactive application of a new interpretation of state criminal law violated the due process right to notice. (*See* Appellant's Opening Brief at 81-86; Appellee's Brief at 69-77; Reply Brief at 36-39.)

In *Rogers*, the United States Supreme Court rejected the *Bouie* claim of a defendant convicted of murder in Tennessee. Tennessee's highest court had affirmed the murder conviction by retroactively abolishing that state's centuries-old common law "one year and a day rule" regarding causation of death. *Rogers*, 532 U.S. at 455. In finding that this apparent change in state law did not violate due process, the Supreme Court reiterated the standards it set forth in *Bouie*:

> "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect."

Rogers, 532 U.S. at 457 (brackets in original, quoting *Bouie*, 378 U.S. at 354). Declining to apply the strict limitations of the Ex Post Facto Clause to state court judicial decisionmaking, *Rogers* explained: "In the context of common law doctrines (such as the year and a day rule),

---

1. Respondent respectfully requests leave to submit this letter despite it's exceeding the prescribed word-limit of rule 28(j). This letter has 918 words.

there often arises a need to clarify or even to reevaluate prior opinions as *new circumstances and fact patterns present themselves*." *Rogers*, 532 U.S. at 461, italics added. The "unexpected and indefensible" standard of *Bouie* strikes a balance between the due process interest in preventing "vindictive or arbitrary judicial lawmaking" and the courts' need to "reevaluat[e] and refin[e]" judicial doctrines "as may be necessary to bring the common law into conformity with logic and common sense." *Id.* at 461-62.

At oral argument, the panel queried whether uncertainty about the applicability of the "*Green* rule"[2] at the time of the current murder violated Clark's due process right to notice under *Bouie*. But under the standards stated above, *Bouie* error cannot be premised on a mere *uncertainty* in the state of the law at the time of the crime. *Rogers* and *Bouie* do not require that the law be clearly settled in the People's favor before the crime is committed. Even if a given criminal statute was subject to a range of possible interpretations at the time of the crime, *Bouie* is not violated so long as at least one possible interpretation supporting the prosecution was not so "unexpected and indefensible" as to violate due process. A stricter rule would chill the state courts' legitimate function in "reevaluating and refining" prior caselaw, and applying it to "new circumstances and fact patterns" in a manner which serves "logic and common sense." *Rogers*, 532 U.S. at 461-62.

Here, California's application of its own "*Green* rule" to an arson-murder was, at best, an uncertain area of the law when Clark committed the current murder in January 1982. *Only two cases* applying that rule, *Green* itself and *People v. Thompson*, 27 Cal. 3d 303, 165 Cal. Rptr. 289 (1980), were decided before that date,[3] while an additional case, *People v. Murtishaw*, 29 Cal. 3d 733, 752 & n.13, 175 Cal. Rptr. 738 (1981), held that the independent felonious purpose requirement of the felony-murder statute could be satisfied by the harboring of concurrent objectives.

All of the above California Supreme Court cases involved the underlying felony of *robbery*, a crime uniquely susceptible to technical and "incidental" commission in the course of a murder. The rationale of *Green*, as reiterated in *Thompson*, was to avoid the bootstrapping of merely "incidental" robberies into capital murder. *Green*, 27 Cal. 3d at 61; *Thompson*, 27 Cal. 3d at 322. In both *Green* and *Thompson*, the rule was couched in language specifically referring

---

2. *People v. Green*, 27 Cal. 3d 1, 61, 164 Cal. Rptr. 1 (1980).

3. Because a *Bouie* claim must be decided by "reference to the law which had been expressed *prior to the conduct in issue*" (*Rogers*, 532 U.S. at 457; *Bouie*, 378 U.S. at 356, italics added), California cases decided after the January 1982 murder of David Gawronski cannot support such a claim.

to the theft element of robbery. *Green*, 27 Cal. 3d at 61 (the Legislature's goal in enacting the special circumstance statute is not served "when the defendant's intent is not to steal but to kill"); *Thompson*, 27 Cal. 3d at 323 ("the ultimate issue under *Green* is whether or not the perpetrator's intent to steal was 'merely incidental' to his intent to kill"). The California Supreme Court's interpretation of its own *Green* rule on Clark's automatic appeal was fully consistent with the rationale of *Green* and *Thompson*, and was foreshadowed by *Murtishaw*. Thus, even if the applicablility of the felony-murder special circumstance to Clark's conduct was not clearly settled in January of 1982, the *Clark* ruling was not "unexpected and indefensible" and did not violate *Bouie*.

CONCLUSION

For the reasons discussed herein, in Appellee's Brief, and at oral argument, the district court's judgment should be affirmed.

Sincerely,

Scott Taryle

SCOTT A. TARYLE
Deputy Attorney General

For BILL LOCKYER
Attorney General

SAT:sat:emo

DECLARATION OF SERVICE

Case Name: ***William Clark v. Jill L. Brown, Warden of California State Prison at San Quentin***
Case No: **02-99007**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **April 21, 2005,** I placed a copy of the attached

28(j) LETTER

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Sean K. Kennedy
Mark R. Drozdowski
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, CA 90012

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **April 21, 2005**, at Los Angeles, California.

Declarant

SAT:emo
LA2002XF0004

No. 06-287

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, Jr., Acting Warden, San Quentin State Prison, California, Petitioner

v.

WILLIAM CLARK, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PROOF OF SERVICE OF BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND RESPONDENT'S APPENDIX

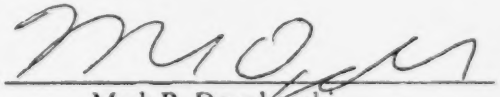
I, Mark R. Drozdowski, a member of the Bar of this Court, do swear or declare that on this date, October 6, 2006, as required by Supreme Court Rule 29, I have served the enclosed **BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI; RESPONDENT'S APPENDIX** on each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Scott A. Taryle, Deputy Attorney General, Counsel for Petitioner
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 897-6496

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2006.



Mark R. Drozdowski
Counsel of Record